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Supreme Court of the United States

OCTOBER TERM, 1895.

163-754

Society of Shakers at Pleasant Hill, Kentucky, Napoleon D. Brown, James W. Shelton, and Mary Jane Sutton, Trustees and Agents of the Society of Shakers at Pleasant Hill, Kentucky ..... *Appellants,*

VERSUS

Oliver Watson and Letitia Souther, Executrix of Henry Souther, Deceased ..... *Appellees.*

PETITION FOR CERTIORARI.

DANIEL W. LINDSAY,
HENRY L. STONE,
WATSON A. SUDDUTH,
Counsel for Petitioners.

PHIL B. THOMPSON, Sr.,
R. P. JACOBS,
Of Counsel.

United States Circuit Court of Appeals.

FOR THE SIXTH CIRCUIT.

NOTICE.

SOCIETY OF SHAKERS AT PLEASANT HILL, KENTUCKY, NAPOLEON D. BROWN, JAMES W. SHELTON AND MARY JANE SUTTON, TRUSTEES AND AGENTS OF SAID SOCIETY OF SHAKERS . . . . . *Appellants,*

VERSUS

OLIVER WATSON AND LETITIA SOUTHER, EXECUTRIX OF HENRY SOUTHER, DECEASED . . . . . *Appellees.*

Notice is hereby given to the appellees, Oliver Watson and Letitia Souther, executrix of Henry Souther, deceased, and their counsel of record, that upon the verified petition of the appellants, the Society of Shakers at Pleasant Hill, Ky., Napoleon D. Brown, James W. Shelton and Mary Jane Sutton, trustees and agents of said Society of Shakers, and upon all the pleadings and proceedings herein, they will move the Supreme Court of the United States, on the 16th day of December, 1895, in the city of Washington, D. C., at the opening of the court on that day, or as soon thereafter as counsel can be heard, for a writ of certiorari directed to the honorable judges of the Circuit Court of Appeals of the United States for the Sixth Circuit, commanding them to forthwith certify and return to the said Supreme Court of the United States all of the proceedings by them had in the said action, wherein the Society of Shakers at Pleasant Hill, Ky., Napoleon D. Brown, James W. Shelton, Mary Jane Sutton, trustees and agents of said Society of Shakers, are appellants, and Oliver Watson and Letitia Souther, executrix of Henry Souther, deceased, are appellees.

PHIL. B. THOMPSON, SR.,
R. P. JACOBS,
D. W. LINDSAY,
HENRY L. STONE,
W. A. SUDDUTH,
Solicitors for Appellants, Society of Shakers, et al.

Executed the within notice on Chas. A. Hardin, counsel of record for Oliver Watson and Letitia Souther, executrix of Henry Souther, by delivering to said Hardin a copy of the within, at Louisville, November 26, 1895.

By S. E. BLACKBURN,
Deputy Marshal.

JAMES BLACKBURN,
U. S. Marshal.

Supreme Court of the United States.

OCTOBER TERM, 1895.

MOTION OF PETITIONERS FOR WRIT OF CERTIORARI.

THE SOCIETY OF SHAKERS AT PLEASANT HILL, KENTUCKY, NAPOLEON D. BROWN, JAMES W. SHELTON AND MARY JANE SUTTON, TRUSTEES AND AGENTS OF SAID SOCIETY OF SHAKERS, ... *Appellants.*

VERSUS

OLIVER WATSON AND LETITIA SOUTHER, EXECUTRIX OF HENRY SOUTHER, DECEASED. . . . . *Appellees.*

Now comes the Society of Shakers at Pleasant Hill, Ky., Napoleon D. Brown, James W. Shelton and Mary Jane Sutton, trustees and agents of said Society of Shakers, by Watson A. Sudduth, Henry L. Stone and Daniel W. Lindsay, their solicitors, and move this honorable court for a writ of certiorari, directed to the honorable judges of the United States Circuit Court of Appeals for the Sixth Circuit, commanding them forthwith to certify and return to this court all of the proceedings by them had in a suit now or lately before them, wherein the said Society of Shakers at Pleasant Hill, Ky., Napoleon D. Brown, James W. Shelton and Mary Jane Sutton, trustees and agents of said Society of Shakers, were appellants, and Oliver Watson and Letitia Souther, executrix of Henry Souther, deceased, were appellees.

DANIEL W. LINDSAY,
HENRY L. STONE,
WATSON A. SUDDUTH,
Solicitors for the Society of Shakers at Pleasant Hill, Ky.

Supreme Court of the United States.

To the Supreme Court of the United States:

The petition of the Society of Shakers at Pleasant Hill, Kentucky, Napoleon D. Brown, James W. Shelton and Mary Jane Sutton, trustees and agents of said Society of Shakers, for a writ of certiorari to the judges of the United States Circuit Court of Appeals for the Sixth Circuit, to bring before the Supreme Court of the United States a certain suit in equity, respectfully shows:

I.

That the United States Circuit Court for the District of Kentucky had no jurisdiction of this case, for the petitioners state that a bill in equity was filed in said Circuit Court in the name of one Oliver Watson and one Henry Souther against the Society of Shakers at Pleasant Hill, Ky., on the 11th day of May, 1891, on the following instrument of writing:

"$9,985. October 18, 1882.

"Seven years after date we promise to pay to the order of M. M. Mays or Barer the Some of Nine thousand Nine hundred and eighty-five dollars—100 Dollars, value received, with interest at the rate of 6 per cent per annum from date until paid. Negotiable and payable at the 4 Natiol Bank cincinnati if not paid when dew to Brng 8 per cent from date.

"DUNLAVY & SCOTT,

"*Trustees of the Society of Shakers at Pleasant Hill, Ky.*"

It was alleged in said bill that said instrument of writing had been indorsed and transferred by M. M. Mays, the payee therein, to Oliver Watson, and by said Oliver Watson had been assigned to his co-complainant, Henry Souther, as collateral security for a loan. At the time this original bill was filed, Henry

Souther had died, dying between the time said bill was prepared and verified and the time it was filed in the United States Circuit Court for the District of Kentucky. Subsequently, on the 7th day of September, 1891, the said Oliver Watson, one of the complainants in said bill, together with Letitia Souther, who alleged that she was the executrix of the last will and testament of Henry Souther, deceased, filed what is termed "Supplemental Bill," in which it is stated that at the time the original bill was filed Henry Souther was dead, and asking that she be joined as co-complainant with Oliver Watson instead of Henry Souther, deceased.

In this supplemental bill there is no averment at all as to the citizenship or residence of Letitia Souther, nor is there anything in the record, upon which this case was tried, showing either the citizenship or residence of said Letitia Souther; and it was insisted in the United States Circuit Court of Appeals that the making of Letitia Souther a party complainant in this action, without the averment as to her citizenship, ousted the jurisdiction of the United States Circuit Court. And further, the petitioners show that there is nothing in this record to show that the members of the Society of Shakers are citizens of the state of Kentucky, or that they are not citizens of the same state with the complainants, Oliver Watson and Letitia Souther.

The averments as to citizenship in the original bill are as follows (printed record, pp. 1 and 2):

"Oliver Watson of New York in the state of New York, a citizen of the state of New York, and Henry Souther of Fredericksburg, Va., and a citizen of the state of Virginia, bring this their bill in equity against the Society of Shakers at Pleasant Hill, Ky., that being the name by which the community of people commonly called Shakers, located in Mercer county, Kentucky, is commonly known, and against Stephen Boisseau and James Shelton and Napoleon Brown as trustees or agents of the said Society of Shakers at Pleasant Hill, Ky., and as members of said society, all of said defendants being citizens of the state of Kentucky."

There are no averments as to citizenship or residence in the supplemental bill. (Printed record, p. 26.)

The allegation as to the residence by them of the complainants and the defendants in the amended bill are as follows (printed record, p. 37):

"And now comes Oliver Watson and Letitia Souther, executrix of the last will and testament of Henry Souther, deceased, and by leave of court amend their original and supplemental bills herein and state that at the time of the filing of said bills the said Oliver Watson and the said Letitia Souther, executrix of the last will and testament of Henry Souther, deceased, were and still are non-residents of the state of Kentucky, and the defendants named in said bills as trustees of the community of Shakers and all of the community of people called Shakers and all persons composing the same named in said bills were at the time of filing said bills and still are residents of the state of Kentucky."

The Society of Shakers at Pleasant Hill, Ky., is an unincorporated religious society, consisting of many members, governed by certain written articles of covenant, which secure the rights of the members of said community, and give, define and specify the powers, authority and duties and acts to be exercised by the trustees of said community or society, and all of its officers or persons in said community or society. (Covenant, pr. record, pp. 7 to 17, pp. 46 to 57.) It is submitted, therefore, that the Circuit Court of the United States had no jurisdiction of this cause, and that the Circuit Court of the United States and the United States Circuit Court of Appeals for the Sixth Circuit erred in holding that the jurisdiction was not ousted by the joining of Letitia Souther without the requisite allegations of citizenship, and in holding that there was jurisdiction, when the record failed to show the citizenship or residence of the various members of the Society of Shakers at Pleasant Hill, Ky.

It was insisted on behalf of the petitioners herein, defendants in the United States Circuit Court, and appellants in the United States Circuit Court of Appeals, that there was no equity in the bill of the complainants, and that the United States

Circuit Court, sitting as a court of equity, had no jurisdiction to entertain the bill. The bill, supplemental bill and amended bill in this case were not framed with the view of charging any of the property of the Shakers, but this was a simple suit upon the paper hereinbefore set out for a judgment against the Society of Shakers.

There is no allegation in the bill, supplemental bill or amended bill that there was any consideration for the paper sued on, or that any consideration whatever passed to or was received by the Shakers.

It was insisted on behalf of the complainants in the Circuit Court and the Circuit Court of Appeals that an act of the Kentucky legislature, passed February 11, 1828, gave to the Circuit Court the jurisdiction in equity of said proceeding. That act is as follows:

AN ACT TO REGULATE CIVIL PROCEEDINGS AGAINST CERTAIN COMMUNITIES HAVING PROPERTY IN COMMON.

SECTION 1. Be it enacted by the General Assembly of the Commonwealth of Kentucky, that it shall and may be lawful for any person having any demand exceeding the sum of fifty dollars, founded on any contract, implied or expressed, against any of the communities of people commonly called Shakers, living together and holding their property in common, to commence and prosecute suits, obtain decrees and have execution against any such communities, by the name or description by which said community is commonly known, without naming or designating the individuals of such community or serving process on them, except as is hereinafter directed. All such suits shall be by bill in chancery, in the circuit court of the county in which such community reside; and it shall and may be lawful to make parties to such suits all other persons, by name, who may have any interest in the matter in controversy, or who may hold any property in trust for said community, or may be indebted to them.

SEC. 2. Whenever any subpœna founded on any such bill shall be placed in the hands of any officer to execute he shall fix a copy of such subpœna on the door of the meeting house of such community, shall deliver a copy to some known member of the

community, and shall read the subpœna aloud at some one of the dwellings of said community, at least ten days before the term of the court at which said community are required to answer, and on these facts being returned in substance on the subpœna they shall constitute a good service of process on said community, so as to authorize the court to require and compel an answer agreeable to the rules and usages in chancery.

SEC. 3. All answers for and in behalf of such community may be filed on the oath or affirmation of one or more individuals of such community, who shall moreover swear or affirm that he or they have been nominated as the agents or attorneys of such community to defend such suit, and thereupon the individual so answering shall have full power and authority to manage and conduct said suit on the part of such community, or to settle and adjust the same, and all notices to take depositions against said community may be served on such agent or left at their place of residence. Provided, that for good cause shown, the court may at any time permit such agents to be changed or substituted by others of the community; provided, however, that the agents or defendants shall not be compelled to answer on oath to any charges or allegations, which are, by the existing rules of law and equity, cognizable alone in the courts of common law; and provided, further, that in all such cases as mentioned in the foregoing proviso, defendant shall be entitled to a jury, if they, or any one of them, shall signify their desire to that effect at any time before the trial shall have been gone into, and in such case above described either party may require the personal attendance of witnesses and a *viva voce* examination as though the suits were at common law, and the court shall direct such process at the request of either party, or summonses may issue as in other cases of the kind.

SEC. 4. Be it further enacted, that nothing in this act contained shall be so construed as to render the communities aforesaid, or any of them, liable upon contracts entered into by any individual or individuals, not authorized by their laws and usages to contract for such community; nor shall it be so construed as to give to any person who, having been a member of such community, has heretofore left it, or may hereafter leave it, any right, in consequence of such membership, which he or she would not have had if this act had not passed; but such

right shall depend upon and be determined by the laws, covenants and usages of such society and the general laws of the land, except as to the mode of suit.

SEC. 5. Be it further enacted, that any community which may be sued under the provisions of this act, shall have the same rights to change of venue as other defendants.

Approved February 11, 1828.

The Circuit Court sustained the equity jurisdiction of the court upon the theory that this was an action to charge the common property of the Shakers, and the Circuit Court of Appeals went further and sustained the equity jurisdiction of the court upon the theory that the Society of Shakers had received the money sued for and evidenced by the paper sued on, and that, while not a legal demand against the Shakers, it was an equitable charge upon their common property. The pleadings on behalf of complainants in this case were not framed upon any such lines. Neither the bill, supplemental bill, nor amended bill, charged the receipt by the Shaker Society of any consideration for said note, or that they derived any benefit therefrom. There is no property described in any of said pleadings, which is sought to be subjected to the payment of the said alleged debt, and it is submitted, therefore, that the Circuit Court and the Circuit Court of Appeals erred in holding that there was jurisdiction in equity to entertain the bill in this case.

II.

The petitioners say further that the covenant and amended covenant under which the Shaker Society had its organization provided that there should be two or more trustees to manage the affairs and business of the Society, and the record shows there was at the time the paper sued on purports to have been executed three acting trustees, and the record shows beyond controversy, and it was admitted by the complainants, that the paper sued on was signed by but one trustee, to-wit, Dunlavy, who signed the name of Dunlavy & Scott to the paper, as if the two had been partners.

It was contended in the Circuit Court and in the Circuit Court of Appeals on the part of appellants that this paper was not properly executed so as to bind the Society of Shakers, that where there were a number of trustees that not less than the whole number have power to bind the principal by any act, and that the paper, therefore, was not executed in such manner as to bind the society. In its opinion the United States Circuit Court of Appeals concedes that the paper was not executed in a manner to legally bind the society; but the defective execution of the paper is sought to be avoided upon the alleged ground that this mode of signing papers had been ratified by the Society of Shakers, but the record fails to show that the Society of Shakers knew that any paper had ever been executed in that mode, and it fails to show that the society ever knew that this or any other paper had been so executed until this paper was presented to them for payment some time in the year 1889, after both Dunlavy and Scott, whose names purport to have been signed to said paper, were dead. And the Circuit Court of Appeals further held that the Society of Shakers were estopped to question the execution of the paper on the alleged ground that the society had received the consideration in money for said paper. The fact that there was any consideration for said paper was denied by the answer of the Shakers, and the only proof attempted to be introduced to prove that the Shakers ever received this money was the testimony of the two daughters of M. M. Mays, the payee in the note, who were in October, 1882, when said paper purports to have been executed, girls fifteen and sixteen years of age respectively, who testified that they were with their father, M. M. Mays, in the fall of 1882, at the Shaker village, in Mercer county, Ky., and saw their father pay over to Dunlavy a considerable sum of money. This is the only testimony as to what the consideration of the note was. The veracity of these two girls is attacked by eighteen witnesses, who stand in this record uncontradicted; and in addition to that, Mrs. Van B.

Young, a reputable lady, testifies that she had a conversation with one of these girls, and she told Mrs. Young, in the presence of her sister, that she did not know anything about the execution of the note until her father came back from the Shaker village and told her of it.

This record shows by uncontradicted evidence that in October, 1882, M. M. Mays, the payee in said note, and the person who, it is claimed, loaned the Shakers the money represented by said note, was an adventurer, insolvent, and totally without means. (Testimony of Jacob Painter, pr. record, pp. 254-255.) So it is submitted that there is no testimony in this record, worthy of consideration, that the Shakers received one dollar of the money sued for.

It is alleged in the original bill in this case that Oliver Watson, one of the complainants, had given a farm in Virginia to M. M. Mays in exchange for the note sued on. This record shows beyond contradiction that on the 25th day of April, 1889, Oliver Watson wrote to the Shaker Society telling them that he was about to exchange his farm for a note and asking if they acknowledged it as a debt. On the 29th day of April, 1889, the Shaker Society replied to said letter, telling Oliver Watson that they had no record informing them of the loan claimed to have been made for which said note was alleged to have been given, advising him that Scott and Dunlavy were both dead, and that Scott and Dunlavy had no authority under the covenant and by-laws of the society to give such a note, and advising said Watson to decline to accept the note in payment for his farm, and the record shows that after that letter was sent, which Watson does not deny having received, he conveyed his farm to said Mays, taking good care, however, to take a deed of trust on the farm as security in case the note should not be paid.

Now, it is submitted that all of the circumstances surrounding this case show conclusively the combination and conspiracy on the part of Mays and Watson to defraud the Shakers, and that the Circuit Court and the Circuit Court of Appeals erred in hold-

ing that there was any valuable consideration for said note, or that the complainants were entitled to recover.

WHEREFORE, your petitioners respectfully pray that this honorable court will be pleased to grant writ of certiorari in this case to the United States Circuit Court of Appeals for the Sixth Circuit, to bring this case before this honorable court, and for such other relief as to this honorable court may seem just.

WATSON A. SUDDUTH,
HENRY L. STONE,
DANIEL W. LINDSAY,
Solicitors for Petitioners.

PHIL B. THOMPSON, Sr., and
R. P. JACOBS,
of Counsel.

STATE OF KENTUCKY,)
) *Set.*
COUNTY OF MERCER.)

James W. Shelton, being duly sworn, says that he is one of the trustees for the petitioners, The Society of Shakers, and is himself one of the petitioners, and that he is authorized to make the verification in behalf of said petitioners, that he has read the foregoing petition and knows the contents thereof, and that the allegations contained therein are true according to his information and belief. The sources of his knowledge and the grounds of his belief are found in the proceedings and in the record of the case in the said Circuit Court and said Circuit Court of Appeals.

JAMES W. SHELTON.

Subscribed and sworn to before me by said James W. Shelton this 29th day of November, 1895. My commission expires 20th day of April, 1896.

P. E. BELL,
Notary Public for Mercer Co., Ky.

I, Watson A. Sudduth, do certify that I am one of the solicitors for the petitioners, and that in my opinion the petition is well founded, and that the same is one in which the prayer of the petitioners should be granted.

WATSON A. SUDDUTH.

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Supreme Court of the United States

OCTOBER TERM, 1895.

The Society of Shakers at Pleasant Hill, Kentucky, Napoleon D. Brown, Jas. W. Shelton and Mary Jane Sutton, Trustees and Agents of said Society of Shakers . . . . . *Appellants,*

VERSUS

Oliver Watson and Letitia Souther, Executrix of Henry Souther, Deceased . . . . . *Appellees.*

BRIEF FOR PETITIONERS UPON APPLICATION FOR CERTIORARI.

DANIEL W. LINDSAY,
HENRY L. STONE,
WATSON A. SUDDUTH,
Solicitors for Petitioners.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1895.

THE SOCIETY OF SHAKERS AT PLEASANT HILL, KENTUCKY, NAPOLEON D. BROWN, JAS. W. SHELTON AND MARY JANE SUTTON, TRUSTEES AND AGENTS OF SAID SOCIETY OF SHAKERS . . . . . *Appellants*,

v.

OLIVER WATSON AND LETITIA SOUTHER, EXECUTRIX OF HENRY SOUTHER, DECEASED . . *Appellees*.

BRIEF FOR PETITIONERS UPON APPLICATION FOR CERTIORARI.

Two important questions of jurisdiction are presented by the record in this case, and we believe if there were nothing more in the record than these two important questions, the importance of which are emphasized by the statute now in force regulating the rights of appeal to the Supreme Court, that this court would not hesitate to take jurisdiction and grant a certiorari, that the questions of jurisdiction may be settled authoritatively by this court. In addition to that, we believe that an inspection of our petition on the other questions involved in this case will show to the court that it is a case of sufficient importance to require the granting of the writ of certiorari prayed for.

I.

The requisite citizenship of Letitia Souther, executrix of Henry Souther, nowhere appears in this record. We insist that the only real party to the original bill was Oliver Watson. The supplemental bill shows that when the original bill was filed Henry Souther was dead; and the original bill shows that Henry Souther was an indispensable party. We insist that Oliver Watson was the only actual party, for a suit can not be filed in the name of a person who is dead.

In the case of Hurst v. Fisher, 1 Watts & Serg, 441, it is held that the death of the plaintiff before suit brought destroys the action altogether.

To the same effect, 1 Chitty on Pleading, 6th ed., 576.

This point is conceded by the United States Circuit Court of Appeals in its opinion in this case (p. 8). We recognize the rule that if the parties to the original bill have the requisite citizenship, and one of them die *after* the bill is filed, the action may be revived in the name of the personal representative, although such representative do not have the requisite citizenship, but as Henry Souther was not in existence at the time the original bill was filed, and was never in fact a party, there was no action in behalf of Henry Souther to revive in the name of his personal representative, and while this supplemental bill seems to have been treated as a bill of revivor, it is nothing more than an amended bill making Letitia Souther, executrix of Henry Souther, a party to the action for the first time; and in that "supplemental bill" there is no averment of citizenship or residence at all, and, as we have shown, the amended bill, filed after the suggestion of the circuit judge in his opinion, simply avers that Letitia Souther was at the time the original bill was filed, and still is, a non-resident of the state of Kentucky. We submit that this is not sufficient to give the circuit court jurisdiction.

Robertson v. Cease, 97 U. S., 646.
Continental Insurance Co. v. Rhoades, 119 U. S., 237.
Everhardt v. Huntsville College, 120 U. S., 223.

In the case of Robertson v. Cease it is said:

"Citizenship, not merely residence of the party, must be shown by the record."

Again in Brown v. Keene, 8 Pet., 112, it is said:

"The averments of citizenship must be positive and not left to inference."

In the case of Everhardt v. Huntsville College, 120 U. S., 223, it is said:

"That the citizenship of the parties must be distinctly alleged, and that the allegation of residence is not the equivalent of the averment of citizenship for the purpose of jurisdiction in courts of the United States."

The case of Continental Insurance Co. v. Rhoades, 119 U. S., 237, was an action by an administratrix on an insurance policy, and in that case the plaintiff simply stated the citizenship of her intestate, without stating her own citizenship, and the court there says:

"It is true the record does show that letters of administration were granted to her in Pennsylvania, but that does not make her a citizen of that state, . . . and besides the jurisdiction must appear positively. It is not enough that it be inferred argumentatively."

But the United States Circuit Court of Appeals, in this case, held that Letitia Souther was not an indispensable party, and that her coming in by supplemental bill was as intervenor simply, because she had an equity in the case. We insist that Letitia Souther was not merely a formal or proper party, but an *indispensable party*, for it is alleged in the bill that Henry Souther was the owner and holder of this note as collateral security for a loan that he had made to Watson. Therefore, it can not be said that there was any

revivor of a suit, but, as we insist, it was the adding of a new and indispensable party as a party complainant. This can not be said to be a continuation of a suit brought by Henry Souther, because *he* never brought a suit, and it can not be said to be ancillary to the original suit.

We take issue with the Circuit Court of Appeals, where, in its opinion (at p. 8), it says: "Watson, who held the legal title to the note upon which the suit was brought, had filed his bill more than four months before Letitia Souther came in. She had an equitable interest arising upon the pledge of the note as collateral to Watson's indebtedness to the estate she represented. Watson's title was a sufficient foundation on which the case could stand."

Now, we insist that the Circuit Court of Appeals has simply reversed the attitude of the parties; that Watson's interest in the note was a *mere equity* and that Letitia Souther, in the right of her intestate, held the legal title to the note.

In the original bill (p. 5, pr. record) it is alleged that M. M. Mays indorsed the note and delivered it to Watson; and on the same page it is alleged that Oliver Watson delivered said note to said Henry Souther, and there is no allegation in said bill from beginning to end and nothing in this record to show that Souther ever returned the note to Watson or reinvested him with the legal title thereto.

The court will observe that the note is made payable to the order of M. M. Mays, or bearer, which is clearly equivalent to "M. M. Mays, or bearer," and we think the authorities are conclusive on the point that when paper is made payable to a certain person *or bearer*, it passes by delivery; and when delivered, even as collateral, the pledgee takes the legal title.

The case of Eastin v. German American Bank, 127 U. S., 523, is a case where bonds payable to bearer were delivered as collateral security for certain promissory notes, and the question there arose, what title the pledgee took? At p. 536, in commenting on this question, the Supreme Court held:

"Where personal property is pledged, the pledgee acquires the legal title and the possession."

In 2 Randolph on Commercial Paper, p. 296, it is said:

"In states where the statute requires suit against the principal debtor on notice by an indorser or surety to the holder, such notice should be given to the pledgee, as he is the person entitled to bring the suit. And, in general, a pledgee may bring suit on the collateral in his own name."

In 1 Randolph on Commercial Paper, section 175, it is said:

"Paper payable to bearer is negotiable by delivery, and an action will lie in the name of any holder."

And again it is said:

"An instrument payable to A, or bearer, is equivalent to one made payable to bearer."

"The transfer of the legal title, like the delivery of possession, constitutes the evidence of the pledgee's right to property in the thing pledged." Brewster v. Hartley, 37 Cal., 15.

"If the transfer be to secure a debt, and the debtor has the right to the restoration of the property on the payment of the debt at any time, the transaction is a pledge, and not a mortgage, although the legal title passes to the creditor." 2 Parsons on Contracts, p. 113. See also Wilson v. Little, 2 N. Y., 443.

We cite these authorities in answer to the position of the Circuit Court of Appeals, in its opinion, that Letitia Souther did not hold the legal title to this paper.

But if, as we insist, Letitia Souther was an indispensable party, her joinder as complainant in this case, without the necessary allegation as to citizenship, ousted the jurisdiction of the United States Circuit Court, and there is, therefore, manifest error in the decree of said court, for it is held in the case of Morris v. Gilmer, 129 U. S., 315: "If there are several co-plaintiffs in the United States Circuit Court, each plaintiff must be competent to sue."

To the same effect is the case of Anderson v. Watt, 138 U. S., 694.

In its opinion in this case the Circuit Court of Appeals concedes that if Letitia Souther had been united with Oliver Watson as complainant in the original bill, with the same defective allegations as to her citizenship as appear in the supplemental and amended bill, the court would have had no jurisdiction. Where we think the court misapplies the rule is in treating her as an intervenor, for if she, as we have shown by the authorities cited, held the legal title to the paper, she is a party who should have been united to maintain the action, and therefore an indispensable party.

The Circuit Court of Appeals, in its opinion, seems to liken the objection made here to an objection for defect of parties taken for the first time in an appellate court. If it were simply an objection for a defect of parties, we know that a court would look with disfavor upon an objection raised for the first time in an appellate court, but, as we understand the rule, the question of defective averments as to citizenship may be taken advantage of in any court. We insist that the defective statements as to citizenship are never waived, and that the parties may, at the hearing in the appellate court, for the first time raise the question; and, moreover, frequently, this court has *sponte sua* raised the question, reversed the decision of the lower court, and ordered the proceeding dismissed for want of jurisdiction. This is so well known to the court that it is unnecessary to cite any of the many authorities sustaining this well recognized principle.

We think when this court comes to examine the question as to the attitude and rights of Letitia Souther, set up in the original and supplemental bills, it must inevitably conclude with us that when she was made a party the court was without jurisdiction.

The Circuit Court of Appeals, in its opinion, cites the following cases in support of its conclusion that Letitia Souther was ad-

mitted merely as an intervenor, and that becoming a party, as she did, did not oust jurisdiction:

Stewart v. Dunham, 115 U. S., 61.
Freeman v. Howe, 24 How., 450.
Krippendorf v. Hyde, 110 U. S., 276.
Phelps v. Oaks, 117 U. S., 236.
Osborne v. Barge, 30 Fed. Rep., 805.

We desire briefly to comment upon these cases and ascertain if they are not distinguishable. The case of Stewart v. Dunham was a creditor's bill, filed by certain creditors to reach the property of a debtor, which it was alleged had been fraudulently transferred. The bill, as brought by the creditor, was not defective as to parties, and the creditor bringing the bill stated a complete right to sue, both as to parties and as to jurisdiction, and the jurisdiction of the Federal court fully attached; but merely as a matter of convenience, in order to do complete justice, other creditors were allowed to intervene, and the court held that though the citizenship and residence of the intervenors and defendants were not diverse, they should be allowed to intervene.

The case of Freeman v. Howe we think likewise fails to sustain the position. It is true the court decides that where a bill is filed on the equity side of the court to restrain or regulate judgments or suits at law in the same court, and thereby prevent injustice, or an inequitable advantage under mesne or final process, it is not an original suit, but ancillary and dependent, supplementary, merely, to the original suit out of which it had arisen, and that it may be maintained without reference to the citizenship or residence of the parties. We recognize this as a correct principle of practice.

We think that case is fully sustained by subsequent opinions of this court, but we respectfully submit that it does not sustain the opinion in this case.

The case of Krippendorf v. Hyde is very much like the case of Freeman v. Howe, and we think it does not aid the court in its

position; nor do we think the case of Phelps v. Oaks presents a case where an indispensable party was allowed to intervene in the Federal court without ousting jurisdiction. It was a mere question of convenience whether or not in that case the landlord should have been allowed to defend the case.

The case of Osborne v. Barge was a foreclosure suit, where the court had complete jurisdiction, and in order to do complete justice allowed a claimant to intervene and set up, by cross-bill a claim to the property, which was already under the control of the court.

In its opinion, at page 8, the Circuit Court of Appeals says:

"We also agree to their further proposition that when Letitia Souther came in, she came as an original party. The new matter brought forward by her bill was in no proper sense supplemental. Her interest had not before been represented in the suit."

Where the Circuit Court of Appeals is in error, is in holding that Watson had made a case upon which his original bill could stand. He had no further interest in that bill than his equity as the pledgor of the note, and we insist he had stated himself out of court when he stated that the note had been indorsed and delivered to Henry Souther. The original bill, therefore, did show that Henry Souther's estate held the legal title to said note, and we respectfully submit that no step could have been taken in that case by Watson without making the personal representative of Henry Souther a party. And if this be true, it seems to us there is no escape from the conclusion that Letitia Souther was an indispensable party, and that when she was joined as co-complainant the jurisdiction of the circuit court was ousted.

We respectfully submit that there was no jurisdiction in the circuit court, and that there is error in the decree of the circuit court, and in the opinion of the Circuit Court of Appeals in holding that the circuit court had jurisdiction on the record as it stood.

II.

We insist that there was no equity in the bill, and that the complainants had a plain and adequate remedy at law.

The complainants in the court below, however, relied upon an act of the Kentucky legislature, of February 11, 1828, as conferring jurisdiction, upon the idea that it gave to complainants a new right. The circuit court and the Circuit Court of Appeals based the equitable jurisdiction upon the theory that this was an action to charge the property of the society, and not a personal action at all. This court has many times held that state legislation can not confer equity jurisdiction upon a Federal court.

Scott v. Neeley, 140 U. S., 106.
Thompson v. Railroad, 6 Wallace, 134.
Ceates v. Allen, 149 U. S., 451.
Frost v. Spiteley, 121 U. S., 552.

In answer to the contention that, irrespective of the said statute, a court of equity had jurisdiction of such a proceeding, we insist that the bill was not framed upon any such lines, but that the bill was in effect a declaration upon what the complainants conceived to be a purely legal obligation, and the counsel for complainants insisted throughout that the paper was negotiable paper, and never once took the position that it was a proceeding to enforce an equitable lien upon property.

At page 10 of the opinion of the Circuit Court of Appeals it is said:

"The paper is not an obligation of the members of the society, but, as we have said, an equitable charge upon their property."

What property? may we ask. There is no allegation in the bill that the Shakers had any property, and when a suit is brought to enforce a lien upon property, it is a universal rule that it shall describe the property as to kind and location. Nothing of that kind appears in this bill. Moreover, it is clearly shown that the bill was not framed with the idea of subjecting any property, by

the difficulty experienced by the judge of the circuit court when he came to render his decree. He felt that he could not render a personal judgment, and he found that he could not render a decree subjecting any property, and he therefore required the Shaker Society to pay into court the amount which he found to be due, or, failing to do that, to furnish an inventory of what property it had, so that a decree subjecting said property might be rendered.

The case of Perry v. Board of Missions, 102 N. Y., 99, is cited by the Circuit Court of Appeals to sustain the right to proceed upon such an obligation against the property of the society. In that case it was admitted that the money was received and an equitable lien was worked out to secure it, although the paper given in evidence of it was not legally executed.

The Circuit Court of Appeals in the case at bar holds that the paper was not executed strictly according to law, but that, as the proof shows the money went into the common fund, the action was simply to charge such common fund. We respectfully submit that there is no reliable evidence of any kind establishing that this money was ever received by the Shakers, but if the proof had been most controlling, there is no allegation in the bill that the Shakers ever received the money, and, therefore, the proof should not be considered as sustaining the fact that the money did come to the Shakers.

In the case of Wilcox v. Hunt, 13 Peters, 378, it is said:

"The general rule is that the allegations in the answer or plea and the proof must agree, and as there were no averments in the pleading to authorize the proof it was properly rejected by the court."

In Daniel's Chancery Pleading and Practice, 6th ed., vol. I, p. 852, it is said:

"It is a fundamental maxim, both in this court and in courts of law, that no proof can be admitted of any matter which is not noticed in the pleadings."

And in the case of Parsons v. Heston, 11 N. J. Equity, 156, it is said:

"The complainant, if he recovers, must recover on the case made by his bill. The *allegata* and *probata* must correspond."

And to the same effect is the case of Underhill v. VanCortlandt and others, 2 Johnson Chancery, 339.

So we insist that if there had been any reliable proof, it could not aid this bill, which was not framed with the view of charging any property.

III.

The answer of the Shaker Society avers that there were in 1882 three trustees managing the affairs and business of the Society of the Shakers, to-wit, Benjamin B. Dunlavy, Elhannon Scott and Stephen Boisseau; and it avers that neither Scott nor Boisseau executed, or ratified the execution of, the note. Article 3 of the amended covenant, which is exhibited with the answer of the defendants, provides that there shall be two or more trustees, and, as we have stated, there were in fact three. Now our contention is that even if Scott and Dunlavy had each signed this note, and signed it properly with the name of the society by them as trustees or agents, the note would not be binding upon the society.

"A majority of private trustees can not act, but they must all join." 1 Perry on Trusts, section 413; Swayle v. Swayle, 22 Beav., 585.

"In law there is no such person known as an *acting* trustee apart from his co-trustees. All who accept the office are acting trustees. If any one trustee who has accepted refuses to join in the proposed act, or is incapable, the others can not proceed without him." 1 Perry on Trusts, section 411.

In Perry on Trusts, section 412, it is said that all of the trustees must join in order to convey bank stock, execute a conveyance of land, or to pledge the trust property.

This text is ably sustained by the case of Ham v. Ham, 58 N. H., 70. In this latter case it is said that any purchaser of the trust property with notice of the trust takes it charged with all the burdens.

In the case of Smith v. Wildman, 37 Conn., 384, it is said:

"Where the trust is reposed in two persons, their actions should be joint in appropriating the trust funds for the purposes specified in the trust."

In the case of Wilbur v. Almy, 12 How., 180, Mr. Justice Curtis holds that "trustees to sell must unite in the sale and conveyance to pass any title to property held by them jointly" (citing numerous authorities to sustain that principle).

But it may be said that these people were agents and not trustees, beause they are spoken of as both agents and trustees in the covenant. That does not change the principle.

In Mechem on Agency, section 77, it is said:

"Where authority is conferred upon two or more agents to represent their principal in the transaction of business of a private nature, it may well be presumed that it was conferred upon them all from considerations of a personal nature, and in order to derive the benefit of their combined experience, discretion or ability. It is, therefore, the rule that such an agency will be presumed to be joint, and it can be performed by them only jointly, when no intent appears that it may be otherwise executed. . . So where the agency is joint or several, it must be executed by all or one, and not by an intermediate number, unless such an intention clearly appears." Damon v. Grandy, 2 Pick., 345; Story's Agency, 42; Cedar Rapids & St. Paul R. R. v. Stewart, 25 Iowa, 119.

"Even if these persons had been public agents a majority of them could act, but all of them must be present to deliberate." Mechem on Agency, section 78; Williams v. School District, 21 Pick., 75.

In this latter case Chief Justice Shaw says:

"Where a body or board of officers is constituted by law to per-

form a trust for the public, or to execute a power or perform a duty prescribed by law, it is not necessary that all should concur in the act done. The act of the majority is the act of the body. And where all have due notice of the time and place of meeting in the manner prescribed by law, if so prescribed; or by the rules and regulations of the body itself, if there be any; otherwise, if reasonable notice is given, and no practice or unfair means are used to prevent all from attending and participating in the proceeding, it is no objection that all the members do not attend, if there be a quorum."

The Circuit Court of Appeals admits, however, that the paper was not legally executed so as to bind the Society of Shakers, but avoids the effect of the defective execution by holding that the Shaker Society had ratified the acts of Dunlavy in their behalf; and, further, that as the money had been received by the Shakers they would not be heard to dispute the authority of the trustees who gave the paper.

We insist that there is no reliable evidence in this case showing that the Shakers ever received one penny of this money. The evidence relied upon to prove this fact was the testimony of Fannie Owens (p. 108, pr. record) and Mary Meyers (p. 128 pr. record), daughters of M. M. Mays, who was the payee in the note. These two young women were at the time this note purports to have been executed about fifteen and sixteen years of age, and they testified that they were with their father, M. M. Mays, at Shakertown, in the fall of 1882, and saw him pay over to Dunlavy a large amount of money. They say that Scott, one of the other trustees, came into the room for a few minutes while the transaction was going on. The veracity of these two women is impeached by eighteen uncontradicted witnesses. See testimony of James Morledge (p. 203), R. B. Hamilton (pp. 221 and 222), James D. Blythe (pp. 227 and 228), James C. Lupher (p. 230), William Wirebaugh (pp. 232 and 233), G. F. Strawn (p. 240), Jacob Painter (p. 264), William Readel (p. 271). All of these

witnesses prove the bad character of these daughters of Mays and that they were not worthy of belief on oath.

In addition to this impeaching testimony, defendants introduced a very prominent and reputable lady, Mrs. Mary R. Young, wife of Judge Van B. Young, of the Superior Court of Kentucky, who testified that she had a conversation with one of the girls, the other being present, in which she told her they did not know what they were summoned for as witnesses in the case, for they knew nothing about it until their father told them, after they left Shakertown. (P. 310.)

We call this court's attention to another important fact in this case, and that is, that M. M. Mays, the payee in the note, was an adventurer and a man of bad character and was insolvent and absolutely without means in the fall of 1882, when it is claimed he loaned this money to the Shakers. (See testimony of Jacob Painter, pp. 254-255, pr. record.)

The Circuit Court of Appeals, in its opinion (p. 5 of opinion), also finds as a fact established by the record that Mays, the payee of the note, was an adventurer. So, taking all of these facts together, we think the testimony of the daughters should have no weight at all in establishing a fact which the court holds is necessary in this case to charge the society, to-wit, that the money was received by it.

In considering this case, the court will also take into consideration the actions of Watson himself. He wrote to the Shaker Society on the 25th day of April, 1889, to know if they recognized this note as an obligation of the society; and they promptly, on the 29th day of April, replied that Dunlavy and Scott had no authority to bind the society by such a paper, that the society had no record of any such transaction, did not recognize it as a debt, advised him not to accept the note, and, further, told him that both *Scott and Dunlavy were then dead.* And the court will observe that this record shows that this was the first time this note had ever been brought to the notice of the society, and that it was

after both Scott and Dunlavy were dead. Notwithstanding the letter sent to Watson by the Shakers, and which he does not, in his testimony, deny receiving, he claims that he, in good faith, transferred his farm to Mays after that letter was received.

Taking all of the facts of the case, we feel sure that the only conclusion to be reached in the case is that Watson and Mays were conspirators, engaged in a deliberate scheme to defraud the Shaker Society.

We therefore respectfully ask that the motion for a writ of certiorari be sustained.

DANIEL W. LINDSAY.
HENRY L. STONE.
WATSON A. SUDDUTH.
Solicitors for Petitioners.

Office Supreme Court, U. S.
FILED.
DEC 16 1895
JAMES H. MCKENNEY,
CLERK.

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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1895.

The Society of Shakers at Ple sant Hill, Kentucky, Napoleon D. Brown, Jas. W. Shelton and Mary Jane Sutton, Trustees and Agents of said Society of Shakers . . . . . *Appellants,*

VERSUS

Oliver Watson and Letitia Souther, Executrix of Henry Souther, Deceased . . . . . *Appellees.*

BRIEF FOR OLIVER WATSON AND LETITIA SOUTHER, EXECUTRIX IN OPPOSITION TO CERTIORARI.

C. A. HARDIN,
ST. GEO. R. FITZHUGH,
of Counsel.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1895.

THE SOCIETY OF SHAKERS AT PLEASANT HILL, KENTUCKY, NAPOLEON D. BROWN, JAS. W. SHELTON AND MARY JANE SUTTON, TRUSTEES AND AGENTS OF SAID SOCIETY OF SHAKERS, - - - - - *Appellants,*

v.

OLIVER WATSON AND LETITIA SOUTHER, EXECUTRIX OF HENRY SOUTHER, DECEASED, *Appellees.*

Brief of Counsel for Oliver Watson and Letitia Souther Executrix of Henry Souther, Deceased, in Opposition to Petition for Certiorari.

We refer to the opinion of the United States Circuit Court of Appeals, for the Sixth Circuit, filed with the record, and reported in 68 Federal Reporter, page 730, as a complete answer to the petition.

When the bill was filed, Oliver Watson was the legal owner of the Shaker note. He had taken it in payment for the historic estate on the Rappahannock River, immediately opposite Fredericksburg, Va., known as Chatham, of which Watson was the owner.

He had delivered said note to Judge Henry Souther, a citizen of Fredericksburg, on the 28th August, 1889, and taken the following receipt from Souther,—(see record, page 144): "Received of Oliver Watson, a note of which the above is a copy upon the following conditions: I have

advanced him thereon, the sum of five thousand dollars. I am to send said note for payment when due to place of payment, and if paid, to deduct therefrom the said sum of $5,000, with interest from date, together with all sums which said Oliver Watson is indebted to me upon his individual notes, together with all costs, exchange, &c., for collecting said note; and after being reimbursed and paid, I am to pay him the balance of amount received by me upon said note; if said note is not paid, said Watson is to pay me the amount I advance with interest, &c., and the other indebtedness above referred to.

"August 28th, Fredericksburg, Va.

"HENRY SOUTHER."

Oliver Watson did not *indorse* said note to Souther, and his indebtedness to Souther did not amount to half of the principal and accumulated interest of the note; hence it seems but an idle pretence to claim that Watson lost the capacity in a Court of Equity to sue on the note after its maturity and dishonor. Judge Souther's receipt for the note shows plainly that he did not assume the responsibility to bring suit on the note in the event of its dishonor, and hence since Judge Souther could not be compelled to institute suit on the note, there was no one to enforce the collection but Watson; and Watson files the note as part of his Bill, showing that it was in his possession at the date of the filing of the Bill.

The Bill was drawn in the name of Oliver Watson and Henry Souther, alleging that Watson was at that time a citizen of the State of New York and Souther a citizen of Virginia, and both Watson and Souther swore to the Bill on the 13, March, 1891, and the Bill was immediately forwarded to their attorney in Kentucky to be filed in the Circuit Court of the United States at Frankfort. Through inadvertence of said attorney the Bill was not filed until May 11, 1891. In the mean time, on the 4, April, 1891, Judge Souther fell dead on the streets of Fredericksburg, Va., from heart disease.

His widow, Letitia Souther, qualified as his executrix and

his will was admitted to probate on the 17th April, 1891 in the Corporation Court of Fredericksburg, Va., that being the place of residence of said testator and family.

The Bill was amended by making the widow, executrix a party dlaintiff on the 7, September, 189I, in order to assert the equity of Judge Souther's estate to have a part of the amount of said note when collected applied to the payment of Watson's indebtedness to said Souther, and the draftsman of said amended Bill omitted to allege that the widow was a citizen of Virginia, and hence all the idle clamor that has been raised by the defendants, who have been convicted upon the record of a flagrant attempt to repudiate an hon est debt by the most shameful shifts and evasions.

In *Commonwealth of Pennsylvania* v. *Wm. Ravenel, Exor.*, 21 How., 103, the Court held that the domicile of the husband is the domicile of the wife, and that if the husband had his domicile in Pennsylvania at the time of his death, the domicile of his widow remained also in Pennsylvania until it was shown *affirmatively* that she had become a citizen of another State.

Would not the Court in our case, if necessary, *infer* that Mrs. Souther remained, after the death of Judge Souther, a citizen of the State of which her husband, as appears from the Bill signed and sworn to by him, was a citizen at the date of his death, and in which State she took out letters of administration on his estate?

In *Jones* v. *Andrews* 10 Wall., 331, Justice Bradley says, "All that is necessary is that it *fairly* appear by the Bill of what States the respective parties are citizens."

In that case the citizenship only appeared as to some of the parties in the *title* of the suit. Justice Bradley refers with approval to *Express Co.* v. *Kountze Brothers*, 8 Wall.

In this latter case at page 351, Justice Davis says, "It is said that it does not appear that the suit was between citizens of different States. It is true there is no direct averment to this effect, but it is the necessary consequence of the facts stated in the pleading that the parties to the suit were citizens of different States. The averment that the plaintiffs were a firm of natural persons associated together for

the purpose of carrying on the banking business in Omaha, and had been for a period of eighteen months engaged in said business at said place, is equivalent to saying that they had their domicile there. In the country, people usually live and have their citizenship in the place where they do business, especially is this true of persons engaged in a business requiring capital and involving risk at a point which is remote from the great centres of trade and commerce."

Robertson v. *Cease*, 97 U. S., 646, shows that the Court may *infer* the citizenship of parties from the matters in the record outside of the pleadings.

But Mrs. Souther was not an indispensable party to the suit.

In *Payne* v. *Hook*, 7 Wall., 431, the Court says: "It is undoubtedly true that all persons materially interested in the subject matter of the suit should be made parties to it, but this rule, like all general rules, *being founded in convenience*, will yield whenever it is necessary that it should yield in order to accomplish the ends of justice. It will yield if the Court is able to proceed to a decree and do justice to the parties before it without injury to absent persons equally interested in the litigation, but who cannot conveniently be made parties to the litigation. The necessity for the relaxation of the rule is more especially apparent in the courts of the United States, where oftentimes the enforcement of the rule would oust them of their jurisdiction."

In 2 Daniel Ch'y P., 1511, the author says: "It is not every death of a party that abates or renders a suit defective. If the whole interest survives to other parties to the suit, so if the surviving party can sustain the suit, as in the case of several creditors, no revivor is necessary, because representative of the deceased plaintiff can come in under the decree."

The plaintiff did not have an adequate and complete remedy at law; in fact, he had no remedy at law.

The answer admits that the Society consists of more than one hundred members and that the membership is constantly changing. What would be the value of a judgment at

law against the Society of Shakers? They are not a corporation, and not a definite body of people.

By the very terms of the covenant under which they are associated, they are incapacitated in their individual capacity to acquire or own any property, and it is the condition of their admission into the Society that they should renounce the ownership of any property they may bring in, and shall dedicate the same to the church, whatever that name may signify.

Hence the only thing to be reached by a creditor is not the individual liability of the members—not a decree *in personam* against the individuals composing the Society, not even a decree against them in their collected capacity, but against the *common fund*, in the hand of trustees.

The note sued on is not the note of the makers in their individual capacity, but an obligation enforceable against the trust estate which it was intended to bind. It is executed by trustees not to bind individuals but a trust, subject which under both the covenant and the custom and usage of the Society they were empowered to bind, and the record shows clearly that they *intended* to bind the trust by said note. The Society could not be sued as a Society except under the Kentucky statute.

If we must sue at law we must sue a large and constantly changing body of adults and infants with the door wide open for the reception of new members, who become equally interested in the joint estate with those who have borne the heat and burden of the day. But these numerous individuals have renounced all individual property and hence all liability for contracts made by the trustees, for there can be no liability when no capacity to acquire or own property exists; they have placed themselves under perpetual disability of their own contrivance, and thus notified the world that the trust estate is the sole resource from which those furnishing money to maintain the society can obtain reimbursement.

The pretension is set up in the Petition that the Bill does not seek to subject this trust subject—let us see:

The Bill alleges at page 4 of the record, "which said note is signed as follows; Dunlavy and Scott trustees of the Society of Shakers, at Pleasant Hill, Kentucky, and was duly executed in a proper manner to bind said community and *the trust estate held by the said trustees* and was executed in accordance with the custom and usage of said community and of its trustees."

On page 5 the bill again alleges that the plaintiffs are entitled to subject all the property of the Society in the custody of the trustees, and prays that said property, real and personal, may be subjected to the payment of the note, and that a receiver may be appointed to take possession of the trust estate since the trustees could own nothing and had no individual responsibility.

In *Manderville* v. *Riggs*, 2 Peters, 482, equity jurisdiction was sustained in a very similar case.

In *Wylie* v. *Coxe*, 15 How., 420, the Court said there may be a legal remedy, and yet, if a more complete remedy can be had in equity, it is sufficient ground for jurisdiction. See also *Reynes* v. *Dumont*, 130 U. S., 395.

In *Gormley* v. *Clark*, 134 U. S., 348-9, the Court said: "The jurisdiction in equity attaches unless the legal remedy, both in respect to the final relief and the mode of obtaining it is as efficient as the remedy which equity would afford under the same circumstances." See also *Kilbourn* v. *Sunderland; Payne* v. *Hook*, 7 Wall., 430.

In *McConihay* v. *Wright*, 121 U. S., 206, the Court, in answer to the suggestion that the laws of West Virginia furnished an adequate remedy at law, said: "The adequate remedy at law, which is the test of equitable jurisdiction in these courts, is that which existed when the judiciary act of 1789 was adopted, unless subsequently changed by act of Congress."

Judge Story says that the grounds of equity jurisdiction in the case of executors and administrators is *constructive trust*. Here we have a positive trust, and the individual Shakers are practically dead, as far as personal responsibility is concerned. Story's Equity, sec. 532.

The petition seeks to go into the merits of the case, but the statement of the facts in the petition and the facts as they appear in the record bear no resemblance to each other.

The petition insists that the Circuit Court of Appeals found that Mays was an adventurer, and that the bill does not allege that the Shakers received any consideration for the note.

The note on its face, declares it was given for valuable consideration, and it being a negotiable note imports a valuable consideration.

The Court of Appeals says in its opinion. "Mays, the payee of the note was an adventurer, engaged in speculations of one kind and another in Ohio, *and having some money for investment*, went to Pleasant Hill and *loaned the amount represented by the note to Dunlavy and Scott for the Society*."

But upon the petition for *certiorari* all this is irrelevant. The Court said in *Harris* v. *Barber*, 129 U. S., 372, referred to in *American Construction Co.*, v. *Jacksonville R. R. Co.*, 148 U. S., 387, that, "whether the proofs came up to the averments cannot be inquired into upon a writ of *certiorari*. *Certiorari* goes only to the jurisdiction. It does not go to any errors of judgment that may have been committed by the justice in the progress of the exercise of that jurisdiction."

In *American Construction Co.* v. *Jacksonville Railway*, 148 U. S., 383, the Court held that the power conferred by the 6 section of the Act of March 3, 1891, upon the Supreme Court to review by *certiorari* the final judgment of the Unites States Circuit Court of Appeals, should be exercised sparingly and with great caution, and only in cases of peculiar gravity and general importance, or in order to secure uniformity of decision." Citing

Lau OW Bew's case, 141 U. S., 583.
144 U. S., 47.
In re Woods, 143 U. S., 202.

The Court said: "The act has uniformly been so construed and applied by this Court as to promote its general purpose of lessening the burden of litigation in this Court,